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No. 79-1056

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC., *Petitioner,*

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Union of Electrical, Radio and Machine Workers, AFL-CIO ("IUE") moves, pursuant to Rule 36.3 of the Rules of this Court, for leave to file the attached Brief Amicus Curiae in this case.

INTEREST OF AMICUS

IUE and its affiliated locals are the collective bargaining representatives for employees at nearly 1,000 companies in the electrical equipment industry. IUE represents more than 300,000 members, of whom approximately 45% are women and Blacks or other minorities.

In this case, Northwest Airlines argues that the respondent unions share the culpability for the discriminatory practices found by the lower courts in the *Laffey* litigation, and claims that a right of contribution generally would have

a deterrent effect on unions and enhance compliance with the fair employment laws. This argument assumes union resistance to, rather than support of, equal employment opportunities. In fact, however, the role of unions in the enforcement of federal anti-discrimination laws, and hence the effect of a right of contribution, is far more complex than suggested by Northwest.

Unlike the typical situation in which contribution has been recognized, unions not only may be held directly liable to employees in Title VII cases, they may also bring legal actions to enforce the Act. Since its Organizational Convention in 1949, IUE has pledged itself to the elimination of invidious discrimination in employment.[1] Pursuant to this mandate, the Union has conducted an extensive legal program to assist employees in filing charges of discrimination and in instituting legal actions to enforce federal fair employment laws. Many of these cases have been brought by IUE and its locals as named plaintiffs, and IUE has supported individual employees in many other cases in which the unions were not named. These efforts were recently described by Member Murphy of the National Labor Relations Board in the following terms:

> [IUE] has been a prime mover for equality in the workplace . . . It is a union which is dedicated to bettering the working conditions of its members and is equally dedicated to wiping out any vestige of

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[1] Women have always been employed in large numbers in the electrical equipment industry, in part due to the availability and willingness of women, generally at low wages, to perform the intricate work that is required. At present, more than one million women are employed in the industry. Except for periods of national emergency when women have been needed to work in all types of jobs, women in the industry traditionally have been restricted in the jobs which they are permitted to perform. In addition, jobs predominantly filled by women have always been paid less than jobs of similar skill and worth performed by men.

employment discrimination based on artificial grounds. This Union and its General Counsel have contributed immensely to achieving these goals.

General Motors Corp., 243 NLRB No. 19 (1979) (dissenting opinion), petition for review pending, Nos. 79-1682, et al. (D.C. Cir.).

By exposing unions to financial liability which they otherwise would not have, recognition of a right of contribution would discourage unions from undertaking to enforce the fair employment laws. Furthermore, apart from liability, the assertion of a claim for contribution creates conflicts between the unions and the aggrieved class which impedes a union's ability to enforce the fair employment laws. In its efforts to enforce fair employment laws, IUE has had practical experience with the deleterious effects of even an employer's assertion of a right to contribution, wholly apart from its vindication. In order to insure that all of the consequences of a right to contribution are brought before the Court, this motion for leave to file brief amicus curiae should be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

The International Union of Electrical, Radio and Machine Workers, AFL-CIO ("IUE") submits this Brief Amicus Curiae in support of the position of the respondent labor organizations in this case.

INTEREST OF AMICUS: THE IUE PROGRAM TO ENFORCE FEDERAL FAIR EMPLOYMENT LAWS

As set forth in the Motion for Leave to File Brief Amicus Curiae, the interest of IUE in this case derives from the negative effect which recognition of a right to contribution will have on the efforts of the IUE to en-

force federal fair employment laws. In order to appreciate the extent of this interest, it is important to recognize the breadth of the IUE enforcement program and the results which it has achieved.

Since its establishment as a labor organization in 1949, the IUE has vigorously and persistently worked to achieve equality of employment opportunity for its female and minority members.[1] The Union has been in the forefront of efforts to obtain federal legislation to protect the rights of minority and female workers.[2] It has also attempted for many years to end discriminatory employment practices through collective bargaining at the national and local

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[1] The delegates to the IUE's Organizational Convention in 1949 adopted a resolution calling for the establishment of a Civil Rights and Fair Practices Department as an administrative unit within the IUE and urging affiliated IUE locals to establish similar units. Proceedings, IUE Organizational Convention, p. 175 (1949). The Union's Second Convention in 1950 affirmed the establishment of this Department and further resolved that it "engage in all necessary activities and programs . . . to abolish all discrimination on grounds of race, color, sex, nationality or creed." Proceedings, IUE Second Constitutional Convention, p. 238 (1950). Subsequent IUE conventions have adopted increasingly strong resolutions condemning race, sex and other invidious discrimination, and pledging the resources of the Union to a farreaching effort to achieve non-discrimination in the workplace.

[2] In 1962 and 1963, the IUE presented testimony on several occasions endorsing federal equal pay legislation. E.g., *Hearings on H.R. 3861 Before the Special Subcommittee on Labor of the House Committee on Education and Labor,* 88th Cong., 1st Sess. 108 (1963); *Hearings on H.R. 8898 Before the Select Subcommittee on Labor of the House Committee on Education and Labor,* 87th Cong., 2d Sess. 169, 181 (1962). The Union also strongly supported the enactment of Title VII. E.g., *Hearings on H.R. 405 and Similar Bills to Prohibit Discrimination in Employment Before the General Subcommittee on Labor of the House Education and Labor Committee,* 88th Cong., 1st Sess. 66 (1963). After the decision in *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), the

levels,[8] and through grievances and arbitration where these remedies are available. Finally, and most importantly for purposes of this case, since 1972 IUE has undertaken a

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IUE strongly supported legislation to amend Title VII to require employers to provide disability benefits for pregnancy. *Hearings on S.995 Before the Subcommittee on Labor of the Senate Committee on Human Resources,* 95th Cong., 1st Sess. 222 (1977).

[8] IUE's collective bargaining efforts with respect to EEO issues at one of the major employers in the electrical manufacturing industry were recently summarized by an NLRB Administrative Law Judge:

> In the 1954 national negotiations the Union unsuccessfully proposed contract clauses providing for equal pay without distinction as to sex, and extension of hospitalization benefits to cover pregnancy and childbirth. In 1958 IUE added a proposed clause eliminating wage differentials based on sex, and in 1960, also proposed extending contractual pension provisions to widows and survivors. In 1963 IUE again submitted the above proposals, together with a proposal to amend the antidiscrimination clause of the National Agreement (Section IV, paragraph 3), to include a reference to sex. The latter proposal was resubmitted and adopted by the parties in 1966, and the reference to women's and men's jobs was simultaneously deleted from the contract. In 1970 the antidiscrimination clause was again amended to add a reference to age. The clause is not subject to contractual arbitration, although the National Agreement leaves the Union free to strike over nonarbitrable grievances. In 1966, 1970 and 1973, the Union unsuccessfully proposed that the clause be made subject to binding arbitration. In these negotiations IUE made other proposals which related or purported to relate to the status of female and minority group employees. In 1966 and 1970, IUE proposed clauses to prohibit sex discrimination in upgrading and layoffs, extention of disability insurance coverage to pregnancy, and training of females for higher paying jobs. In 1970 and in 1973, IUE proposed a layoff and recall system based on plantwide seniority, and plantwide posting of job opportunities. In 1973 IUE also proposed a joint employer-union committee, coupled with binding arbitration, to review rates alleged to be discriminatory, and elimination of all contract provisions which treated pregnancy in a different manner from other forms of disability, e.g., a provision requiring 9 months employment as a prerequisite for receipt of benefits.

major legal program to enforce the rights of its members under fair employment laws.[4]

Westinghouse Electric Corp., 239 NLRB 106, 128 (1978). Similar efforts have been made by IUE with the other major employers in the industry and by IUE locals throughout the country. See, e.g., *General Motors Corp.*, 243 NLRB No. 19 (1979).

[4] On March 31, 1972 the Equal Employment Opportunity Commission issued comprehensive Guidelines on Discrimination Because of Sex which established principles to guide employers, unions and other persons with respect to employment practices adversely effecting women. See 37 F.R. 6836 (April 2, 1972), 29 C.F.R. § 1604.1 *et seq.* At its Convention in June of the same year, IUE pledged to "take all the necessary steps to assure compliance with the [Guidelines] by all employers with whom it has contracts." Proceedings, IUE 15th Constitutional Convention, p. 190 (1972). Pursuant to this mandate, the IUE Executive Board in March, 1973 directed all IUE locals to examine their existing contracts and practices using guidelists prepared by IUE to determine whether there was discrimination. Local unions that found practices which they believed to be discriminatory were instructed to seek immediate changes from the employer. The Executive Board pledged "to take appropriate legal steps with respect to any employer who refuses to amend existing agreements in order to comply with the policy of this Union and the requirements of the law."

In order to facilitate the review process, the IUE Executive Board subsequently instructed local unions to obtain from employers certain statistical and other information related to the employers compliance with Title VII and the Equal Pay Act. When a number of employers declined to provide this information for bargaining purposes, IUE filed unfair labor practices charges. After protracted litigation, the NLRB upheld IUE's right to the requested civil rights related information. *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), petitions for review pending, Nos. 78-2067, et al. (D.C. Cir.); *East Dayton Tool & Die Co.*, 239 NLRB 141 (1978), petitions for review pending, Nos. 78-2066, et al. (D.C. Cir.); *The Bendix Corporation*, 242 NLRB No. 8 (1979), petition for review pending, No. 79-1479 (D.C. Cir.); *The Bendix Corporation*, 242 NLRB No. 170 (1979), petitions for review pending, Nos. 79-1609, et al. (D.C. Cir.); *White Farm Equipment Co.*, 242 NLRB No. 201 (1979), petitions for review pending, Nos. 79-1654, et al. (D.C. Cir.); *General Motors Corp.*, 243 NLRB No. 19 (1979), petitions for review pending, Nos. 79-1682, et al. (D.C. Cir.).

Pursuant to the IUE enforcement program, IUE and IUE locals have filed more than 500 charges of sex or race discrimination with the Equal Employment Opportunity Commission or with similar state agencies. In addition, IUE and IUE locals have filed more than fifty actions in court seeking redress from sexually or racially discriminatory employment practices. Ten such cases are presently pending before federal courts under Title VII or the Equal Pay Act. In each of these cases, the IUE or its locals have been named as plaintiffs along with women employees in the bargaining units.

The IUE legal program has achieved significant results, both in modifying employers' future practices and in providing relief to protected group employees for prior discrimination. A Title VII action brought by IUE against Sperry Rand Corporation, for example, resulted in the company's agreement to revise its sexually discriminatory pension policies and to make available $2.5 million in increased pension benefits. *Lynch* v. *Sperry Rand Corp.*, No. 70 Civ. 4809 (S.D.N.Y.). In settlement of two cases involving the Westinghouse Electric plant in Mansfield, Ohio, the company agreed to pay $160,000 to a class of female employees who had been prematurely furloughed as a result of separate seniority lists for men and women and to adjust the pension rights and seniority rights for these women. The employer also agreed to increase the job rates for nine traditionally female job classifications and to pay backpay to employees who had worked in these jobs. *IUE and Rhinehart* v. *Westinghouse Electric Corp.*, No. C-70-537; *Albrecht* v. *Westinghouse Electric Corp.*, No. C-70-912 (N.D. Ohio).

As the result of an IUE suit at General Electric's Tyler, Texas plant, the company agreed to discontinue its requirement that all employees be at least 5 feet 7 inches tall and to provide compensatory relief to women who had been injured by the limitation. *Allen* v. *General Electric Co.*,

C.A. 5452 (E.D. Tex.). A Title VII action brought by IUE involving Westinghouse Electric's Newark, Ohio plant resulted in the rehiring, with backpay and retroactive seniority, of a group of female employees who had been laid off ahead of men with lesser seniority, as well as an agreement to permit so-called upward bumping to avoid future layoffs and to permit women to achieve their "rightful place" by bumping less senior male employees in higher grades. *Nutter and IUE* v. *Westinghouse Electric Corp.*, No. C-2-75-602 (S.D. Ohio). A case involving the discriminatory layoff of female employees at General Electric's Pittsburgh Apparatus Service Shop has resulted in a recent settlement under which $176,250 will be paid by the company to a class of eighteen women, plus pension coverage and other relief. See, *Smouse* v. *General Electric Co.*, 626 F.2d 333 (3d Cir. 1980).

A major focus of IUE's legal program has been employer practices that disadvantage pregnant workers. After the EEOC Sex Discrimination Guidelines held that discrimination against pregnant employees constitutes a violation of Title VII, 29 C.F.R. § 1604.10, IUE filed charges with the EEOC alleging that the three largest employers in the electrical manufacturing industry—General Electric, Westinghouse and General Motors—discriminated against pregnant employees in a number of their practices. Subsequently, nationwide class actions were filed by IUE in federal court against the three companies. In one of these, IUE was successful in the district court and in the court of appeals in establishing that the denial of sickness and accident benefits for pregnancy-related disabilities violated Title VII, *Gilbert and IUE* v. *General Electric Co.*, 375 F.Supp. 367 (E.D.Va. 1974), *aff'd*, 519 F.2d 611 (4th Cir. 1975), but this Court ultimately reversed that decision. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). In the Westinghouse case, IUE attorneys overcame a motion to dismiss founded on *Gilbert*, *Eberts* v. *Westinghouse Electric Corp.*, 581 F.2d 357 (3d Cir. 1978), and a settlement

has been achieved that will provide $305,000 in backpay to women who suffered from a number of the company's pregnancy policies, as well as injunctive and other individual relief. A settlement has also been proposed in the action brought against General Motors. *Grogg and IUE* v. *General Motors Corporation,* 73 Civ. 63 (S.D.N.Y.).

A longtime concern of IUE in its efforts to eliminate sexually discriminatory employment practices has been the problem in the electrical manufacturing industry of systematic underpayment of jobs—such as assembly line jobs —traditionally performed by women.[5] In *Burry* v. *General Electric Co.,* No. 72853 (N.D. Ind.), an action challenging pay practices at GE's Ft. Wayne, Indiana plant under the Equal Pay Act, a settlement was obtained providing $300,000 in backpay and the same amount annually in future pay increases for 350 employees who occupied 19 traditionally female jobs classified below their actual value.[6] In *Casimer* v. *General Electric Company,* No. C-72-716 (N.D.Ohio), IUE, IUE Local 707 and 30 women workers

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[5] Attention first was drawn to this situation more than thirty-five years ago by the War Labor Board which found that two of the major employers in the industry, General Electric Company and Westinghouse Electric Corporation, had arbitrarily reduced the wages for jobs performed by women by as much as one-third below the proper rates determined by their own job evaluators. *In Re General Electric Co.,* 28 War Lab. Bd. R. 666 (1945). IUE believes that these sex-based wage disparities have never been eliminated.

[6] As part of the settlement, GE also agreed to reevaluate the rates paid to approximately 170 other job classifications not covered by the increases. In negotiations resulting from the reevaluation, IUE obtained increases for an additional 1650 employees, almost all of whom were women, totalling approximately $700,000 annually. The settlement of the Fort Wayne litigation set the pattern for the resolution of IUE grievances at plants carrying out similar functions in Youngstown, Ohio and Tiffin, Ohio, where GE agreed to increase the rates of traditionally female jobs in 21 and 29 classifications, respectively.

at General Electric's Cleveland Wire Drawing Plant challenged a practice dating back to 1958 under which male wire drawers were paid more than females doing substantially the same jobs. Male employees whose rates were reduced by the company in 1972 in an effort to reduce the disparities later joined as plaintiffs in the action. In November 1978 a settlement was achieved under which GE agreed to increase the labor grade of several classifications and to pay $130,000 in backpay.

In 1974, IUE, four of its locals and a group of female employees challenged the initial assignment, promotion and compensation practices at Westinghouse plants in Fairmont, West Virginia, Buffalo, New York, and Trenton and Bloomfield, New Jersey. The Fairmont case was settled by the plaintiffs in return for the company's agreement to raise the labor grades of 13 job classifications a total of 22 labor grades, to pay backpay to the persons who occupied these jobs in the preceding five years, to expand job posting practices to include posting of all job vacancies, to establish new training opportunities for craft jobs traditionally filled by men, and other relief. *IUE* v. *Westinghouse Electric Corp.*, C.A. 75-62-F (N.D.W.Va.). In addition to a partial settlement resolving many of the issues raised, the Trenton case has resulted in a major appellate decision defining the scope of Title VII in the area of wage discrimination. *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corporation*, —F.2d—, 23 FEP Cases 588 (3d Cir. 1980), petition for rehearing pending.[7] The Buffalo and Bloomfield cases

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[7] It does not effect the legal issues for decision in this case, but we do note that the Third Circuit held that Title VII's prohibition against sex discrimination in compensation is broader than that of the Equal Pay Act, not identical to it as Northwest has asserted. Brief of Northwest Airlines, Inc., p. 30. See also *Gunther* v. *County of Washington*, 602 F.2d 882 (9th Cir. 1979), on rehearing, 22 FEP Cases 1650 (1980), petition for certiorari pending, No. 80-429 (O.T. 1980).

are still pending.[8]

In addition to IUE, a number of other International Unions and numerous local unions have initiated actions to enforce federal fair employment laws.[9] As we

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[8] Shortly after the cases were filed, however, thirteen female job classifications at the Bloomfield plant were upgraded from three to seven labor grades, and a plantwide wage review was conducted in Buffalo which resulted in increases in the classification of 90% of the predominantly female jobs in the plant.

[9] The International Woodworkers of America (IWA) has filed a large number of Title VII actions on behalf of its black members in the southern wood products industry. Six of the original actions filed by the IWA resulted in settlements totalling about $400,000 in backpay for about 1000 victims of discrimination, as well as substantial prospective relief. Youngdahl, Equal Employment And Affirmative Action: The Union Role, 27th Annual New York University Conference On Labor, 163, 175-180 (1974). See *International Woodworkers of America* v. *Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977).

The Communications Workers of America (CWA) has filed over 100 EEOC charges against AT&T and other telephone companies alleging sex discrimination in connection with pregnancy. See, *Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcommittee on Labor of the Senate Committee on Human Resources,* 95th Cong., 1st Sess. 272 (1977) (statement of Glenn E. Watts). The union has filed eight federal suits against employers for discrimination related to pregnancy. *Southwestern Bell Tel. Co. Maternity Benefits Litigation,* 602 F.2d 845 (8th Cir. 1979); *CWA* v. *AT&T Long Lines Dept.*, 513 F.2d 1024 (2d Cir. 1975); *CWA* v. *Mountain States Tel. & Tel Co.*, 18 FEP Cases 281 (D. Colo. 1977); *CWA* v. *New York Telephone Co.*, 8 FEP Cases 509 (S.D.N.Y. 1974); *CWA* v. *Illinois Bell Tel. Co.*, 16 FEP Cases 1494 (N.D. Ill. 1973); *CWA* v. *Southern Bell Tel. & Tel. Co.*, C.A. No. C-73-1739 (N.D. Cal. 1973); *CWA* v. *General Telephone of California* (N.D. Cal. 1973).

The International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW) has been active in the enforcement of Title VII. *UAW* v. *Detroit Plastic Molding Co.*, Civil Action Nos. 78-70991, 79-72597 (E.D. Mich.), challenges a

variety of employment practices as discriminatory on grounds of both sex and race. In *UAW* v. *Taylor,* 8 FEP Cases 622 (E.D. Mich. 1974), *aff'd* in unpublished opinions Nos. 76-1474, 76-1966, 76-1767 (6th Cir. 1977), *cert. denied* in No. 76-1966 *sub nom. Firestone Tire & Rubber Co.* v. *Taylor,* 435 U.S. 970 (1978), the union secured the invalidation under Title VII of a state law denying unemployment benefits to pregnant women. After the state law was struck down, the EEOC filed suit against Chrysler Corporation, based on a charge submitted by the UAW, for payment of retroactive benefits. The UAW intervened as a plaintiff. *EEOC* v. *Chrysler Corp.,* appeal pending No. 80-1203 (6th Cir.). The UAW has filed numerous other EEOC charges, including 3 nationwide charges against Ford, Chrysler and General Motors for pregnancy discrimination, more than 30 charges against individual plants for violations of the 1978 pregnancy disability amendments to Title VII, and 20 charges against General Motors concerning state "female protective" laws.

The Newspaper Guild, which represents 34,000 employees in editorial, advertising, business and other non-mechanical departments of newspapers, magazines and wire services, has undertaken Title VII litigation as one component of its civil rights program. *Rosario* v. *New York Times Co.,* 74 Civ. 4457 (S.D.N.Y.), was filed by the Guild and a class of minority employees alleging racial discrimination. The basis for the suit was a 1973 EEOC charge filed by the Guild. The parties recently negotiated a settlement, now under consideration by the court, which provides monetary relief in excess of $549,000. In 1973 the Guild filed charges of race and sex discrimination against the Associated Press with the EEOC and human rights agencies in six states. After unsuccessful conciliation, a Guild local and eight present and former members filed suit in 1978. *Wire Service Guild Local 222 et al.* v. *Associated Press,* C.A. 78-4502 (S.D.N.Y.).

Many other international and local unions have brought Title VII actions to secure the rights of their members. *E.g., Air Line Stewards and Stewardesses Ass'n Local 550* v. *Trans World Airlines,* 23 FEP Cases 119 (7th Cir. 1980); *Social Service Union Local 535* v. *County of Santa Clara,* 609 F.2d 944 (9th Cir. 1979); *Local 194, Retail, Wholesale and Department Store Union* v. *Standard Brands, Inc.,* 540 F.2d 864 (7th Cir. 1976); *United Transportation Union Local 974* v. *Norfolk Western Ry. Co.,* 533 F.2d 336 (4th Cir. 1975); *Air Line Stewards & Stewardesses Ass'n* v. *Ameri-*

show in the body of this Brief, if a right to contribution on behalf of employers is recognized by this Court, union enforcement efforts such as these will be seriously hampered.

SUMMARY OF ARGUMENT

Unions have a well recognized right to file administrative charges and to institute judicial proceedings to enforce Title VII. Contemporaneous rulings by the EEOC and early judicial opinion recognizing this right were approved by Congress in 1972 and have been uniformly followed by the courts.

Unions can make important contributions to the enforcement of the federal fair employment laws. Through their knowledge of plant practices and access to civil rights related information from employers, unions can bring to light discriminatory practices by employers, inform workers about their rights, and assist them in seeking redress from authorities. Where litigation is necessary, unions can

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can Airlines, 490 F.2d 639 (7th Cir. 1973); *Rosen and Utility Co. Workers Ass'n* v. *Public Service Elec. & Gas Co.,* 477 F.2d 90 (3d Cir. 1973); *Air Line Pilots Ass'n* v. *Western Air Lines,* 23 FEP Cases 1042 (N.D. Cal. 1979); *NAACP and Postal Workers Union* v. *U.S. Postal Service,* 22 FEP Cases 502 (N.D. Ga. 1977); *Schoeppner and IBEW* v. *General Telephone Co. of Pennsylvania,* 417 F.Supp. 453 (W.D. Pa. 1976); *Thompson and Michigan Ed. Ass'n* v. *Board of Education,* 71 F.R.D. 398 (W.D. Mich. 1976); *Power Division Ass'n* v. *New Orleans Public Service Corp.,* 14 FEP Cases 257 (E.D. La. 1975); *Air Line Pilots* v. *Ozark Air Lines,* 10 FEP Cases 463 (N.D. Ill. 1975); *Air Line Pilots* v. *Continental Air Lines,* 10 FEP Cases 462 (N.D. Ill. 1974); *Amalgamated Meat Cutters Local 340* v. *Safeway Stores, Inc.,* 52 F.R.D. 373 (D. Kansas 1971); *Local 186, International Pulp, Sulphite and Paper Mill Workers* v. *Minnesota Mining and Mfg.,* 304 F.Supp. 1284 (N.D. Ind. 1969); *International Chemical Workers Union* v. *Planters Mfg. Co.,* 259 F.Supp. 3656 (N.D. Miss. 1966).

provide badly needed financial and legal assistance, and they can offer moral support and valuable information.

Creation of an employer's right to contribution would hamper union efforts to enforce or support the enforcement of fair employment laws in three significant ways. First, if charges or litigation filed by or with the assistance of a union can lead to liability for that union, unions will be discouraged from undertaking such efforts. The result will be that many discriminatory employment policies and practices will remain uncorrected and unredressed.

Second, a claim for contribution provides a tactical weapon which employers regularly use to hamper fair employment litigation initiated by unions. The mere assertion of a claim for contribution against the union creates a conflict of interest which prevents union counsel from also representing the aggrieved employees, thus forcing the employees to retain independent counsel, if that is possible. The possibility of a conflict may also impede cooperation between union counsel and counsel for the aggrieved class.

Third, recognition of a right to contribution will impede union support for fair employment actions brought against employers by individual employees or the EEOC. Rather than providing their assistance to these plaintiffs through intervention, realignment or crossclaims, as the IUE and other unions often elect to do, unions would be encouraged to aid in the defense of the actions in order to avoid the possibility of future liability.

Unions have a unique status under Title VII. They may be held liable directly to employees for their discriminatory acts. But they may also take action to aid employees in enforcing the laws. Recognition of a right to contribution as urged by Northwest would upset this delicate balance by giving employers the ability to impede union enforcement efforts. For this reason, a right of contribution should not be adopted by this Court.

ARGUMENT

1. Recognition of a Right to Contribution in Fair Employment Cases will Seriously Hamper Union Enforcement Programs.

Shortly after the enactment of Title VII, the General Counsel of the EEOC ruled that a Union is a "person aggrieved" within the meaning of sections 706(b) and (f)(1) of Title VII, for purposes of filing administrative charges and instituting judicial proceedings to redress unlawful discrimination against its members. EEOC, Opinion of the General Counsel (May 6, 1966), reprinted in part, *International Chemical Workers Union* v. *Planters Mfg. Co.*, 259 F.Supp. 365, 368 (N.D. Miss. 1966). In the *Chemical Workers* case, *supra*, the district court adopted this interpretation of the General Counsel and sustained the union's right to sue under Title VII on behalf of its members. *Accord, Local 186, International Pulp, Sulphite and Paper Mill Workers* v. *Minnesota Mining and Mfg. Co.*, 304 F.Supp. 1284 (N.D. Ind. 1969). This interpretation was approved by Congress in 1972, S.Rep. No. 92-415, 92d Cong., 1st Sess., p. 19 n. 16, and has been uniformly accepted by the courts. See, e.g., *Social Services Union, Local 535* v. *County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979); *International Woodworkers of America* v. *Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977); *Local 194* v. *Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976); *Air Line Stewards & Stewardesses Ass'n* v. *American Airlines*, 490 F.2d 639, 642 (7th Cir. 1973); *I.U.E.* v. *Westinghouse Electric Corp.*, 73 F.R.D. 57, 59 (W.D.N.Y. 1976).

Through their knowledge of plant practices, often dating back many years, and their right of access to pertinent information from the employers, see *supra*, p. 4, unions are in an excellent position to identify discriminatory practices by employers, which may otherwise have gone unrecognized by the affected employees. They are also able to inform affected workers about their rights and to assist them in bringing their complaints before the proper au-

thorities. Moreover, as a number of courts have recognized, through their ability to offer financial resources, knowledge of the plant, expertise and the moral support of their members, unions can contribute immeasurably to the effectiveness of fair employment litigation. See *International Woodworkers of America* v. *Georgia-Pacific Corp., supra,* 568 F.2d at 67 ("The financial backing and legal expertise that unions can provide would materially advance the type of private enforcement essential to the effectiveness of Title VII."); *Local 194* v. *Standard Brands, Inc., supra,* 540 F.2d at 866 ("The effectiveness of these suits can be increased by allowing unions to place their financial resources and expertise behind the suit."); *I.U.E.* v. *Westinghouse Electric Corp., supra,* 73 F.R.D. at 59 (" . . . the unions should remain as plaintiffs so that the individual employees in vindicating their civil rights may utilize the expertise and financial support of their unions . . .").

In every major case filed by IUE, the employer has counter-claimed for contribution. See, e.g., *Lynch* v. *Sperry Rand Corp.,* 62 F.R.D. 78 (S.D.N.Y. 1973); *Grogg* v. *General Motors Corp.,* 72 F.R.D. 523 (S.D.N.Y. 1976); *I.U.E.* v. *Westinghouse Electric Corp.,* 73 F.R.D. 57 (W.D.N.Y. 1976); *I.U.E.* v. *Westinghouse Electric Corp.,* 17 FEP Cases 16 (N.D.W.Va. 1977). IUE has successfully resisted these claims on both factual and legal grounds. Nevertheless, in three major respects, recognition by this Court of an employer's right of contribution would have a deleterious effect on union efforts to enforce or suppress the enforcement of fair employment laws.

First, there is the prospect of a union's enforcement efforts resulting in financial liability. This is true even of a union that has always acted in complete good faith, as back pay liability under Title VII can be imposed regardless of good faith. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Moreover, some courts have held unions liable under Title VII merely for signing an agreement with a

discriminatory term, although the union opposed the adoption of the term, e.g., *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), and although the provision was discriminatory because of prior unilateral discrimination by the employer. E.g., *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381-82 (5th Cir. 1974); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). And even where unions knowingly participated in discrimination, they may now, because of a change of leadership, a change of philosophy or even to avoid potential liability, want to take action to expose discrimination and seek its redress. As frequently this is the most likely, if not the only, maner in which the discrimination will be redressed, this action should be encouraged. If enforcement efforts can be the precipitant of union liability, they will be discouraged.

Second, apart from the prospect of union liability, recognition of a right to contribution would seriously impair unions' effectiveness in prosecuting fair employment actions. A claim for contribution provides a tactical weapon which employers regularly use to delay the litigation and increase its cost. It makes it more difficult for a union to assist individual plaintiffs, and may make it impossible for the litigation to go forward. Thus, where unions join in Title VII actions as named plaintiffs with their members, the mere assertion by the employer of a right to contribution against them creates a potential conflict of interest which may prevent union counsel from also representing the aggrieved employees. See *Lynch* v. *Sperry Rand Corp.*, *supra*, 62 F.R.D. at 84-85; *Grogg* v. *General Motors Corp.*, *supra*, 72 F.R.D. at 529-30. In order to include individual plaintiffs in the action and for it to be maintained as a class action under Rule 23, a claim for contribution necessitates the individuals' finding and retaining independent, qualified counsel who is willing to handle complex litigation for many years, usually without reimbursement of expenses and for only a contingent fee. Thus, a right of contribution

undercuts a major value of union Title VII enforcement—the provision of paid counsel to represent the interests of the aggrieved employees in the litigation.[10]

Moreover, even where separate counsel are available to work on a contingent basis, the claim for contribution continues to be an impediment to union enforcement efforts. In one IUE case, the potential conflict of interest created by the employer's contribution claim has been held to restrict cooperative efforts between counsel for union plaintiffs and counsel for individual plaintiffs, necessitating independent discovery, briefing, etc. *I.U.E.* v. *Westinghouse Electric Corp., supra,* 17 FEP Cases at 18. These conflicts would similarly arise where the union is not named as a plaintiff but is supporting the employees' action through the provision of counsel or other financial support.

Third, recognition of a right of contribution would undercut union support of Title VII actions brought against employers by individual or government plaintiffs. The EEOC, for example, regularly joins unions as defendants in Title VII actions under Rule 19(a) where the unions were not named in the underlying charge of discrimination. It

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[10] This problem is illustrated by recent IUE litigation involving General Electric Company. In June, 1978, IUE Local 201 and a number of individual employees filed actions under Title VII and the Equal Pay Act in the United States District Court for the District of Massachusetts alleging discrimination against female employees in wage, promotions and other practices at four GE plants in the Boston area. *IUE Local 201* v. *General Electric Co.*, C.A. No. 78-1045-Mc; *Krikorian* v. *General Electric Co.*, C.A. No. 78-1444-Mc. Attorneys retained by the union plaintiffs appeared on behalf of both the union and individual plaintiffs. However, GE filed contribution claims in both actions and then moved to disqualify union counsel from representing the *Krikorian* plaintiffs on the grounds of conflict of interest. In order to avoid lengthy proceedings on the representation question, union counsel withdrew as counsel for the individual plaintiffs, and the individuals were forced to locate new counsel.

has been uniformly held that unions joined in this manner may not be held liable for damages, since as to them the jurisdictional prerequisites of Title VII have not been met. See, e.g., *E.E.O.C.* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974). In such cases, IUE regularly lends its support to the EEOC by moving to realign as a plaintiff, e.g., *E.E.O.C.* v. *Chrysler Corp.*, 8 FEP Cases 343 (S.D. Ohio 1974), or where realignment is not allowed by filing crossclaims of discrimination against the employer, e.g., *E.E.O.C.* v. *Chrysler Corp.*, No. 78-3394 (6th Cir. May 16, 1980), petition for certiorari pending, No. 80-221 (O.T. 1980). Similarly, IUE often supports the efforts of individual employees by moving to intervene as a plaintiff in private Title VII actions. E.g., *Henry* v. *Westinghouse Electric Corp.*, 13 FEP Cases 799 (S.D. Ind. 1976); *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124, 126 (6th Cir. 1975), *aff'd sub nom I.U.E.* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). If an employer were permitted to obtain contribution against the union, the union would be encouraged to aid in the defense of the action, not in its prosecution.

After a two year study of the relationship between Title VII objectives and collective bargaining, the EEOC recently adopted a policy recognizing and encouraging the good faith efforts of unions to end discrimination. EEOC, Background Paper And Resolution To Encourage Voluntary Affirmative Action In Collective Bargaining, reprinted in BNA, Daily Labor Report (April 2, 1980), p. D-1. The EEOC resolved to modify its own administrative and litigation practices in cases where unions are involved in order to encourage greater enforcement effort by unions. The EEOC's action recognizes the important contribution that unions can make to the enforcement of the federal fair employment laws.[11] The common law right to con-

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[11] In its statement, the EEOC relied expressly on the litigation efforts of the IUE as support for its position.

tribution which Northwest urges this Court to create would significantly reduce the likelihood that unions will serve this valuable purpose.[12]

II. Creation of a Right to Contribution Will Upset the Delicate Balance Regarding Unions Established by Congress in Title VII.

The right of contribution which Northwest requests this Court to recognize is not found in the language or legislative intent of Title VII or the Equal Pay Act. Employers' contribution against unions is inconsistent with the en-

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[12] In addition to the negative consequences for Title VII enforcement, discouragement of union fair employment efforts runs counter to the policies of the National Labor Relations Act. If unions are inhibited from enforcing fair employment laws, women and minority employees will often take action independently. As this Court has recognized, the development of ad hoc splinter groups organized along sexual or racial lines to make demands on employers or seek recourse from administrative agencies or the courts, undermines the role of the union as the exclusive representative of the employees:

> [A union] has a legitimate interest in presenting a united front on [employment discrimination] as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.

Emporium Capwell Co. v. *Western Addition Comm. Org.*, 420 U.S. 50, 70 (1975). Similarly, discrimination on the basis of sex or race in working conditions "sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act. . . ." *United Packinghouse, Food & Allied Workers, Int. Union* v. *N.L.R.B.*, 416 F.2d 1126, 1135 (D.C. Cir. 1969) (Wright, J.). The point is not that protected *employees* may not take their own actions to enforce the federal fair employment laws, for they obviously can; the point is that contribution gives *employers* the opportunity to interfere with the legitimate representative function of unions in assisting and supporting employees' enforcement efforts.

forcement scheme contained in these statutes. See Brief Amicus Curiae of AFL-CIO. In particular, Congress has struck a careful balance regarding the effect of the fair employment laws on unions by making them liable under Title VII directly to employees for their unlawful acts, while at the same time encouraging unions to take action to enforce the law. As IUE's experience demonstrates, see *supra*, pp. 14-17, contribution upsets this balance by allowing employers to interfere with unions' good faith efforts to redress discrimination against their members.

CONCLUSION

For the foregoing reasons, this Court should not create a right to contribution against unions in fair employment cases.

Respectfully submitted,

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